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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/732,726	12/10/2003	William T. Ball	5564-152	2017
22442	7590	12/09/2008		
SHERIDAN ROSS PC 1560 BROADWAY SUITE 1200 DENVER, CO 80202			EXAMINER FETSUGA, ROBERT M	
			ART UNIT 3751	PAPER NUMBER
			MAIL DATE 12/09/2008	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/732,726	<b>Applicant(s)</b> BALL, WILLIAM T.	
	<b>Examiner</b> Robert M. Fetsuga	<b>Art Unit</b> 3751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 15 November 2008.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 11-23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 11-23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 10 December 2003 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

1. A request for continued examination under 37 CFR 1.114 was filed in this application after appeal to the Board of Patent Appeals and Interferences, but prior to a decision on the appeal. Since this application is eligible for continued examination under 37 CFR 1.114 and the fee set forth in 37 CFR 1.17(e) has been timely paid, the appeal has been withdrawn pursuant to 37 CFR 1.114 and prosecution in this application has been reopened pursuant to 37 CFR 1.114. Applicant's submission filed on November 15, 2008 has been entered.

2. Applicant's claim for the benefit of a prior-filed application under 35 U.S.C. 119(e) or under 35 U.S.C. 120, 121, or 365(c) is acknowledged. Applicant has not complied with one or more conditions for receiving the benefit of an earlier filing date under 35 U.S.C. 120 as follows:

This application is claiming the benefit of prior-filed nonprovisional application No. 09/593,724 (applicant's listing of "09/953,724" apparently a typographical error) under 35 U.S.C. 120, 121, or 365(c). Copendency between the current application and the prior application is required. Since the applications are not copending, the benefit claim to the prior-filed nonprovisional application is improper. Applicant is required to delete the reference to the prior-filed application from the first sentence(s) of the specification, or the

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application data sheet, depending on where the reference was originally submitted, unless applicant can establish copendency between the applications.

3. The restriction requirement imposed March 28, 2005 is hereby withdrawn. Claims 11 and 21 are not patentably distinct in light of the prior art of record.

4. The proposed drawing correction filed on August 26, 2005 has been disapproved as containing new matter. The description of the "opening" step associated with the drain port 28 illustrated in Fig. 8 is not found in the originally filed disclosure.

5. The amendment filed August 26, 2005 is objected to under 35 U.S.C. 132(a) because it introduces new matter into the disclosure. 35 U.S.C. 132(a) states that no amendment shall introduce new matter into the disclosure of the invention. The added material which is not supported by the original disclosure is as follows: The paragraph added to page 9, beginning at line 25, where Fig. 8 is discussed. The description of the "opening" subject matter associated with the drain port 28 is not found in the originally filed disclosure. Claim 19 also recites this subject matter.

Applicant is required to cancel the new matter in the reply to this Office Action.

6. The drawings are objected to because reference numeral "28" apparently should be --29-- in Fig. 6. Corrected drawing sheets in compliance with 37 CFR 1.121(d) are required in reply to the Office action to avoid abandonment of the application. Any amended replacement drawing sheet should include all of the figures appearing on the immediate prior version of the sheet, even if only one figure is being amended. The figure or figure number of an amended drawing should not be labeled as "amended." If a drawing figure is to be canceled, the appropriate figure must be removed from the replacement sheet, and where necessary, the remaining figures must be renumbered and appropriate changes made to the brief description of the several views of the drawings for consistency. Additional replacement sheets may be necessary to show the renumbering of the remaining figures. Each drawing sheet submitted after the filing date of an application must be labeled in the top margin as either "Replacement Sheet" or "New Sheet" pursuant to 37 CFR 1.121(d). If the changes are not accepted by the examiner, the applicant will be notified and informed of any required corrective action in the next Office action. The objection to the drawings will not be held in abeyance.

7. The disclosure is objected to because of the following informalities: In the amendment filed August 26, 2005 to page

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7, line 10, at lines 4, 12 and 14 of the amendment, "10" apparently should be --20--, and at line 14 of the amendment, "12" apparently should be --26--; and page 7, line 29, "10" apparently should be --20--. Appropriate correction is required.

8. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: Proper antecedent basis for the "thin diaphragm" set forth in claim 18 could not be found in the specification. Applicant is reminded claim terminology in mechanical cases should appear in the descriptive portion of the specification by reference to the drawing(s).

9. Claims 11, 14, 16, 21 and 23 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 11 is unclear as to whether the "bathtub" is intended to be part of the claimed combination since the bathtub is only set forth as environment in the claim preamble, but is also structurally defined in the claim body (lns. 5, 10 and 13). Claims 14, 16, 21 and 23 are similarly indefinite.

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10. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. Claims 11, 12, 14 and 21-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over CH 346187 and Fritz et al. '531.

The CH 346187 (Gebert) reference discloses an overflow assembly comprising: an overflow pipe 1 including an upper end (at 4), a lower end 2, and an elbow 3; a lip 5; a nut 8 including a lug 11; a bathtub including a wall 7; and a cap 14.

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Therefore, Gebert teaches all elements set forth in claims 11, 12, 21 and 22 except for the provision of a diaphragm.

Although the upper end of the Gebert overflow assembly does not include a diaphragm, as claimed, attention is directed to the Fritz et al. '531 (Fritz) reference which discloses an analogous overflow assembly which further includes an upper end 21 having a diaphragm 15/76. Therefore, in consideration of Fritz, it would have been obvious to one of ordinary skill in the overflow assembly art to associate a diaphragm with the upper end of Gebert in order to facilitate hydraulic testing (col. 1 lns. 49-52). Re claim 22, the diaphragm taught by Fritz is removable (col. 4 lns. 38-41).

Re claim 23, although the upper end of the Gebert overflow assembly does not include a sealing washer, as claimed, attention is again directed to Fritz which discloses a sealing washer 16. Therefore, in further consideration of Fritz, it would have been obvious to one of ordinary skill in the overflow assembly art to associate a sealing washer with the upper end of the Gebert overflow assembly in order to provide a better seal.

12. Claims 11, 12, 14 and 21-23 are rejected under 35

U.S.C. 103(a) as being unpatentable over Gebert and Fritz as applied to claims 11, 12, 14 and 21-23 above, and further in view of Oropallo et al.



Re claim 21, to the extent use of the separate nut 8 and retaining ring 10 to secure the cap 14 in Gebert does not meet the open-ended claim language "said nut element comprising at least one lug extending radially from the nut element" (lns. 10-11), the Oropallo et al. (Oropallo) reference is cited for showing a single piece cap-securing lug 24 and nut 21.

Therefore, in consideration of Oropallo, it would have been obvious to one of ordinary skill in the art to form the lug and nut of Gebert as a single piece in order to reduce the number of parts requiring assembly.

13. Claims 13 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gebert and Fritz (with or without Oropallo) as applied to claims 11 and 12 above, and further in view of Ball '241.

Re claim 13, Ball '241 teaches the obvious use of a cutting instrument to remove an overflow testing diaphragm (col. 3 lns. 2-5). Re claim 15, Ball '241 further teaches the common provision of a pipe 42 and vent pipe 40 (Fig. 2) associated with an overflow assembly.

14. Claims 16-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gebert and Fritz (with or without Oropallo) as applied to claim 11 above, and further in view of Ball '931 and Ball '241.

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Although the Gebert bathtub plumbing system may not include a drain pipe, lock washer and drain closure, as claimed, attention is directed to the Ball '931 reference which discloses an analogous bathtub plumbing system which further includes a drain pipe, lock washer and drain closure (col. 1 lns. 8-24). Therefore, in consideration of Ball '931, it would have been obvious to one of ordinary skill in the bathtub plumbing system art to associate a drain pipe, lock washer and drain closure with the Gebert bathtub plumbing system as being a common type of bathtub plumbing system. Furthermore, Ball '241 teaches plugging the drain port of a bathtub plumbing system during hydraulic testing "in any convenient manner" (col. 2 lns. 59-60), and further teaches use of a (thin) diaphragm 64 to accomplish such plugging (col. 2 lns. 37-40 and col. 2 ln. 65 thru col. 3 ln. 13).

15. Applicant is referred to MPEP 714.02 and 608.01(o) in responding to this Office action.

16. Any inquiry concerning this communication should be directed to Robert M. Fetsuga at telephone number 571/272-4886

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who can be most easily reached Monday through Thursday. The  
Office central fax number is 571/273-8300.

/Robert M. Fetsuga/  
Robert M. Fetsuga  
Primary Examiner  
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